United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

U.S.C.A. NO.

United States Court of Appeals

FOR THE SECOND CIRCUIT

75-7414

DIANA M. SCHUM, Plaintiff-Appellant, -v- CHARLES P. BAILEY, M.D., TERUO HI[illegible]GE, M.D., ST. BARNABAS HOSPITAL FOR C[illegible]ONIC DISEASES and DOES I to XXXV, including each and every number between I and XXXV, inclusive, Defendants-Appellees.	U.S. DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK CASE NO. 74 C[illegible] 4354 JUDGE OWEN

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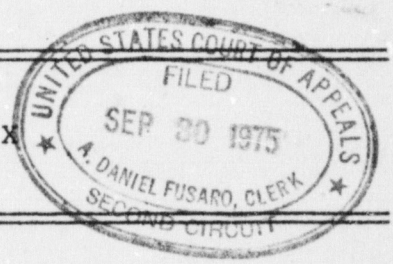

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Under what circumstances may the New York statute of limitations be tolled in medical malpractice actions?

2. Has the New York statute of limitations been tolled given the facts *sub judice*?

STATEMENT OF THE CASE

A. Jurisdiction. This Court has jurisdiction over the pending cause by virtue of the existence of diversity of citizenship and a sum in dispute exceeding $10,000.

B. Procedural History.

The presently pending cause of action was instituted by the filing of a Complaint with the Clerk of the United States District Court for the Southern District of New York on October 4, 1974. Plaintiff's Complaint sets forth five causes of action against the various defendants, to wit: negligence and medical malpractice; negligence by reason of failing to obtain informed consent prior to radical operative procedures; trespass and assault and battery; fraud.

After having answered, defendants Bailey and Hirose moved to dismiss plaintiff's Complaint as being time-barred.

By Order dated June 23, 1975, the trial judge granted defendants' motions and dismissed the Complaint.

C. Statement of Facts.

This appeal arises by reason of the trial court's ruling that *CPLR* §*214(6)* acts so as to time-bar plaintiff's causes of action.

The relevant facts have never been disputed. Indeed, for present purposes, all factual allegations made by plaintiff must be treated as true. Therefore, the following are the proven facts:

In September, 1967, plaintiff was admitted to St. Barnabas Hospital, Bronx, New York, where she was placed under the care of Teruo Hirose, M.D. Dr. Hirose was to perform certain diagnostic and clinical evaluation procedures so that an evaluation could be reached concerning the source of certain physical maladies plaintiff was then experiencing. After conducting a battery of tests over two days, plaintiff was discharged from St. Barnabas and was informed that she suffered from no coronary disease nor any related cardiovascular problem.

Some two weeks later plaintiff was contacted by Charles P. Bailey, M.D., the director of thoracic and cardiovascular surgery at St. Barnabas Hospital. Dr. Bailey informed plaintiff that the previous diagnosis, as set forth above, was incorrect. Plaintiff

was further informed that immediate radical surgery was required to correct an existing cardiac anomaly.

Relying upon this representation, plaintiff was re-admitted to St. Barnabas Hospital on October 20, 1967 so that open-heart surgery could be performed upon her. This surgery was in fact performed on October 25, 1967. As a residual effect of such procedure, four metal breast plates were inserted in plaintiff's chest cavity to aid in the healing of plaintiff's breast bones. These plates have never been removed.

Plaintiff has alleged that the foregoing facts have given rise to her several stated causes of action, namely: (1) That the utilization of radical surgical procedures to remedy plaintiff's condition (a right coronary arterial fistula to the right atrium) violated defendants' professional obligations to plaintiff; so as to constitute negligence and malpractice. Note should be taken that plaintiff does not challenge the diagnosis of her malady, only the steps which were undertaken to allegedly remedy her condition; (2) That what in fact occurred was the utilization of plaintiff's body for surgical procedures when, in fact, defendants knew no such procedures were required. Such allegation does not bespeak of faulty diagnosis, but rather alleges that defendants engaged in a scheme to utilize plaintiff as a human guinea pig so as to perfect their surgical procedures.

Based upon the foregoing, plaintiff submits that the trial court committed reversible error in holding that the New York statute of limitations applicable to malpractice actions has run and that plaintiff's causes of action are presently moot.

ARGUMENT

POINT I

THE STATUTE OF LIMITATIONS APPLICABLE TO PLAINTIFF'S MALPRACTICE CAUSE OF ACTION HAS BEEN TOLLED.

The Court below based its opinion that the statute of limitations has run upon the provisions of *CPLR §214(6)*.

Plaintiff acknowledges, as an undisputed fact, that her complaint was not filed within three years of the commission of the tortious acts complained of. Plaintiff further acknowledges that *CPLR §214(6)* provides a three-year statute of limitations for professional malpractice actions. However, plaintiff further alleges that her action is not presently barred.

In determining the merits of defendants' motions for summary judgment, the Court below erred in failing to accept, as true and proven, all relevant allegations which were properly pleaded in the complaint (A1-11) as well as plaintiff's Affidavit submitted in opposition to the motions in question (A27-31). It is clear that the trial court did not follow the oft-cited admonition that any doubt as to the lack of genuine issue of material fact must be resolved in favor of the party opposing the motion, in this case, the plaintiff (A32). In fact, this general principal

of law has been consistently applied to deny motions for summary judgment where an issue of fact exists as to the running or tolling of a statute of limitations.

In *Sheets v. Burman, 322 F. 2d 277 (5th Cir. 1963)*, an appellate court reversed the district court's entry of a summary judgment in favor of a defendant physician in the context of a malpractice suit, finding genuine issues of fact to be present concerning the date of termination of the physician-patient relationship.

In *Dobberg v. Dow Chemical Co., 19[illegible] F. Supp. 337 (ED Pa. 1961)*, the court, in affirming the denial of a summary judgment in favor of a defendant in an appeal arising under *28 USC §1292(b)* stated:

> "Only by developing the facts in a trial of the case can it be determined whether there is truly no genuine issue as to any material fact entitling the defendant to a judgment as a matter of law on its plea of prescription."

See also, Calvin v. Calvin, 214 F. 2d 226 (D.C. Cir. 1954).

If the trial court had followed the above-cited principals, the following facts should have been treated as true (defendants never having even attempted to deny such facts):

1. Both Bailey and Hirose were treating physicians of plaintiff;

2. Certain operative procedures were performed upon plaintiff when no basis for such procedures existed;

3. Plaintiff has suffered permanent injuries by reason of such tortious acts; and

4. Plaintiff could not, even with the utmost exercise of due dilligence, have ascertained such facts within three years of the surgery.

Fortunately, New York no longer adheres to a dogmatic application of the statute of limitations to medical malpractice cases. Until recently one would have been barred from instituting a malpractice action even if knowledge of the malpractice could not have been obtained until three years after the fact; the cause of action being deemed to have accrued at the time of the malpractice. However, in *Flanagan v. Mount Eden General Hospital*, *24 NY2d 427, 301 N.Y.S. 2d 23 (1969)*, the bell of the discovery rule began tolling. In *Flanagan*, clamps were negligently allowed to remain within the plaintiff's body after a gall bladder operation. This fact was not discovered, nor could it have been discovered, until more than three years after the operation. While

it was recognized that a statute of limitation embodies the public policy of giving repose to human affairs, the *Flanagan* court found that such policy would not be offended by utilization of the "discovery rule", *i.e.*, tolling the statute of limitations until the plaintiff discovers, or should have discovered, the alleged malpractice.

By so ruling, the New York court, while limiting the discovery rule to "foreign object" cases, placed particular emphasis upon certain factors, which factors included: The fact that the plaintiff-patient's action could not be said to be feigned nor frivolous and that no possible causal break could exist between the alleged tort of the physician and the patient's injury. Plaintiff submits that these reasons, which compelled the *Flanagan* court to reach the conclusion it did, are likewise present in the present fact pattern.

Flanagan confined itself to only the case of a "foreign object". However, more recent decisions have extended the "discovery rule". In *Dobbins v. Clifford, 39 A.D.2d 1, 330 N.Y.S. 2d 743 (4th Dept. 1972)*, plaintiff's spleen was surgically removed in 1966. During the course of such surgical removal, it was alleged that plaintiff's pancreas was damaged. Dobbins then instituted a malpractice action some four years after the operation.

In affirming a denial of the defendant-surgeon's motion for summary judgment, based upon *CPLR* §*214(6)*, the appellate division refused to render a decision based solely upon whether or not a foreign object had been left in the patient's body. Rather, the court quite correctly observed:

> "that by following the rationale in *Flanagan*, the rule can be extended to cover the facts of the instant case since the same fundamental factors are present in each. They are: an act of malpractice committed internally so the discovery is difficult; real evidence of the malpractice in the form of the hospital record is available at the time of suit; professional diagnostic judgment is not involved, and there is no danger of false claims."
>
> *330 N.Y.S.2d 746-47.*

And again, in *LeVine v. Isoserve, Inc., 70 Misc.2d 747, 334 N.Y.S.2d 796 (Sup. Ct., Spec. T. 1972)*, it was judicially recognized that the "discovery" for tolling the statute of limitations cannot blindly be limited to "foreign object" fact patterns. In *LeVine*, plaintiff was exposed to radiation from an alleged defective radioactive isotope. Seven years after the exposure, plaintiff instituted an action for, *inter alia*, personal injuries. Defendants' motion to dismiss the complaint, as being barred by the statute of limitations, was dismissed by the Court.

> "The rationale for limiting the 'discovery rule' to foreign object cases 'is the fear of specious claims by disgruntled patients and the difficulties of proving negligence and causation where the malpractice is not evidenced by something so tangible as a clamp in the abdomen'. The availability of the isotope or the reports concerning it obviate the danger of a specious claim insofar as the defective nature of the isotope is concerned. This being so, the problems involved in connecting the negligence with the injuries are better left to trial rather than *ipso facto* depriving the plaintiffs of their opportunity to surmount those problems.
>
> "To bar plaintiffs from bringing suit before any manifestation of injury is, on the facts presented, unwarranted."
>
> *334 N.Y.S.2d at 284.*

Certainly, that portion of plaintiff's Complaint which alleges negligence should not be presently deemed barred. For, as one comentator has noted:

> "There is a perceptible march towards a rule of discovery in all malpractice cases...The extensions of the *Flanagan* rule [*Dobbins* and *LeVine*] make eminently good sense. In due course it seems inevitable that the fundamental rule in malpractice cases will collapse and that a discovery rule will replace it in all malpractice cases, whether involving foreign objects, erroneous diagnosis, or treatment. It may be prudent for the Legislature to place an outside limit beyond which the patient cannot sue; but it is impossible to avoid the inexorable conclusion that in malpractice cases the period of limitation should not begin to run until the plaintiff could reasonably know that he [or she] has a cause of action."
>
> *McLaughlin, CPLR Commentaries, C 214:6 at 31-32 (McKinney's 1973).*

The Court below erred in not finding the following factors present, the presence of which should toll the statute of limitation:

1. That the operation in question was obviously an internal procedure, making discovery of its needlessness difficult;

2. Real evidence of the malpractice is present, both in form of hospital records and physician's records;

3. Diagnostic judgment is not involved. Plaintiff is prepared to conclusively demonstrate at the time of trial that no sound medical reason existed which could have led a reasonably competent surgeon to the conclusion that the operation in question should have been performed;

4. No danger exists that plaintiff's claim is false or frivolous. The four breast plates presently existing in her chest cavity should be sufficient to bear witness to this fact.

P O I N T II

PLAINTIFF'S CAUSE OF ACTION ALLEGING FRAUD IS NOT A MERE RESTATEMENT OF HER MALPRACTICE CLAIM AND HENCE IS NOT TIME-BARRED.

Defendants assert that the Fourth Count of plaintiff's Complaint merely restates malpractice in the terminology of fraud. However, both defendants and the Court below misconceived the thrust of the Fourth Count of plaintiff's Complaint. As is alleged:

> "2. That during the first or second week in October until the time the plaintiff, Diana M. Schum, entered the defendant, St. Barnabas Hospital for Chronic Diseases, on or about October 20, 1967, for open heart surgery by defendant, Charles P. Bailey, M.D., the defendants, Teruo Hirose, M.D., Charles P. Bailey, M.D., and Does I through X, represented to plaintiff, Diana M. Schum, that she was suffering from a serious cardiac anomaly which urgently required immediate surgical repair to the extent that failure to so submit to immediate surgical intervention posed a serious threat to her life.
>
> "3. That such representation by the defendants, Charles P. Bailey, M.D., Teruo Hirose, M.D., and Does I through X, is now, and was when made, false." (A10)

These allegations do not fall into those general fact patterns wherein complaints sounding in fraud have been held to be no more than attempts to circumvent the unduly harsh provisions

of *CPLR §214(6)*. A key point of distinguishing such fact situations to that *sub judice* is that the former involved situations wherein the professional defendant allegedly concealed the act of malpractice after the fact.

Rather than alleging such fraudulent concealment, plaintiff alleges fraud in the inducement, *i.e.*, intentional misrepresentation *vis-a-vis* plaintiff's physical condition prior to surgery. These allegations must, of course, at this juncture be considered true. Moreover, plaintiff alleges that defendants were so successful in their deceit that she was unable to ascertain the true character of their conduct until 1974. Therefore, plaintiff urges that it was error for the Court below to hold that *CPLR §214(6)* barred the Fourth Count of her Complaint; rather, the provisions of *CPLR §203(f)* should be applied:

> "Where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer."

As the legislative history to the above-mentioned section states:

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As the legislative history to the above-mentioned section states:

> "Where the facts are not discovered, and the period consequently would not begin to run until long after the event, there seems no reason why the plaintiff should not be required to proceed expeditiously after such discovery. The period adopted for such cases is two years from the discovery, unless the applicable period—— computed without the benefit of postponement for non-discovery——would not have run by this time."
>
> *Sen. Fin. Comm. 6th Rept., Leg. Doc. No. 8 (1962) at 74.*

As the United States Supreme Court has stressed in determining whether a federal statute of limitations had been tolled, the basic inquiry must be whether the legislative purpose is effectuated by tolling the statute of limitations in given circumstances, *Burnett v. New York Cent. R. Co., 380 US 424, 427 (1965)*, and further to determine legislative intent, a court must examine "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act", *Id.* In *American Pipe and Construction Co. v. Utah, 414 US 538 (1974)*, it was stated:

> "The mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."
>
> *414 US at 539.*

Of course, plaintiff does not urge the above to be controlling authority upon the present case, given the fact that a state rather than federal statute of limitations is involved. However, the rationale of such ruling should be found to be equally applicable here. To interpret what the trial court found to be the present state of the law to mean that defendants, who had successfully concealed a fraudulent scheme for a period of many years and thereby escape liability entirely because their cover-up activities were successful, is contrary to the very purpose of allowing a litigant to institute suit. That a court may toll a statute of limitations, when a defendant has affirmatively acted to conceal his fraud, is well established, having been decided one hundred years ago in *Bailey v. Glover*, *88 US 342 (1875)*. As the Supreme Court stated there:

> "To hold that by concealing a fraud, or by committing a fraud in a manner that it conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."
>
> *88 US at 349*.

Plaintiff, therefore, urges that this Court not honor the arguments of defendants, as they were honored in the District

Court; but rather to find that an absolute and fraudulent concealment does in fact toll the statute.

CONCLUSION

The Court below misapplied the law of the State of New York in holding that plaintiff's cause of action alleging malpractice was barred. The Court below further erred in finding that plaintiff's cause of action alleging fraud was barred.

Respectfully submitted,

SHEDD MORAITES & RATHE, ESQUIRES
Attorneys for Appellant

By: ROBERT LICHTENSTEIN

APPENDIX
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DIANA M. SCHUM :

Plaintiff, :

- against - :

CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every number between I and XXXV inclusive. : COMPLAINT

Defendants.

----------X

Plaintiff, Diana M. Schum, brings this action and for complaint, alleges:

1. Plaintiff is a citizen of the State of New Jersey.

2. Defendants are citizens of the State of New York by virtue of residence, license, charter, accreditation or otherwise of the State of New York.

3. Jurisdiction of this Court is based on diversity of citizenship and damages in excess of $10,000.00.

FIRST COUNT

1. That plaintiff is a citizen of the State of New Jersey; that each and every individual defendant herein named is a citizen of the Stateof New York by virtue of residence or the conduct of a profession or business therein; that each and every corporate or associated defendant named herein is a citizen of the State of New York pursuant to license, charter, accreditation, or otherwise of the State of New York or any of its political subdivisions; that the amount of the damages herein claimed by the plaintiff is in excess of the sum of Ten Thousand Dollars, exclusive of costs and interest.

2. The true names or capacities, whether individual, corporate, associate or otherwise, of defendants, Does I to XXXV inclusive, and each of them, are unknown to plaintiff, who, therefore, sues these defendants by such fictitious names and will ask leave of this Court to amend this complaint when the same shall have been ascertained; that plaintiff is informed and believes and upon such information and belief alleges that each defendant designated herein as a "DOE" was responsible, negligently, or in some other actionable manner, for the events and happenings referred to herein which proximately caused injury to plaintiff as hereinafter alleged.

3. That at all times herein mentioned, defendants Charles P. Bailey, M.D. and Teruo Hirose, M.D. and DOES I through X, inclusive, and each of them, were and now are physicians and surgeons licensed by the State of New York to practice medicine and surgery in said State.

4. Plaintiff is informed and believes and upon such information and belief alleges that defendants St. Barnabas Hospital for Chronic Diseases and DOES XI through XX, inclusive and each of them, are authorized and licensed to conduct and did conduct a hospital business or businesses in the State of New York to which hospital or hospitals members of the Public were invited, including the plaintiff, Diana Schum; that the exact form of business organization under which defendants St. Barnabas Hospital for Chronic Diseases and DOES XI through XX, inclusive and each of them conduct their business are unknown to plaintiff at the time of the filing of this complaint and plaintiff will ask leave of this Court to amend this Complaint when the same shall have been ascertained.

5. That at all times herein mentioned, defendants Charles P. Bailey, M.D. and Teruo Hirose, M.D. and defendants DOES XXI through XXXV, inclusive, and each of them, were doctors, nurses, attendants, employees, assistants and consultants, and the like of defendants St. Barnabas Hospital for Chronic Diseases and DOES XI through XX, inclusive.

6. That at all times herein mentioned, defendants, Teruo Hirose, M.D., St. Barnabas Hospital for Chronic Diseases, and DOES I to XXXV inclusive, and each of them, were the agents, servants, and employees, assistants and consultants of their co-defendants and were, as such, acting within the course, scope and authority of said agency and employment, and that each and every defendant, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every other defendant as an agent, servant, employee, assistant, and consultant.

7. That on or about September 18, 1967, plaintiff engaged for compensation the facilities and accommodations of defendant St. Barnabas Hospital for Chronic Diseases, and the professional services of defendant Teruo Hirose, M.D., and DOES XXI through XXXV, inclusive, for a diagnosite work-up and clinical evaluation of a cardiac problem involving her well being and to that end plaintiff was admitted as an in-patient at the said St. Barnabas Hospital for Chronic Deseases on the date above stated.

8. That on September 20, 1967, plaintiff was discharged from the said institution, being at that time informed that the various examinations and tests to which she had submitted were in fact negative in all respects and that said plaintiff had presented no physical indications of organic coronary disease or any related cardiovascular problem.

9. That approximately two weeks thereafter plaintiff received a communication from defendant Charles P. Bailey, M.D., Director of the Department of Thoracic and Cardiovascular surgery at said institution, through his agent, informing her that their original evaluation of the initial findings based on the diagnostic tests and examinations she had undergone were erroneous, inaccurate and clinically misleading in that said tests had allegedly disclosed the existence of an allegedly serious cardiac anomaly which urgently required immediate surgical repair to the extent that plaintiff's failure to submit to immediate surgical intervention posed a serious threat on her life.

10. That relying on the information and counsel so conveyed to her, plaintiff agreed to be re-admitted to the said institution on or about October 20, 1967, for open heart surgery by defendant Charles P. Bailey, M.D.

11. That defendants Teruo Hirose, M.D., St. Barnabas Hospital for Chronic Diseases and DOES XXI through XXXV inclusive, had at all times during the course of plaintiff's pre-operative care, an opportunity and duty to test, evaluate and examine plaintiff's body, organs, vital functions and prior medical history; that in consequence of such tests, evaluations and examinations the said defendants determined and concurred in a finding that plaintiff, to a reasonable medical certainty, suffered from congenital heart disease, to wit: right coronary arterial fistula to the right atrium.

12. That in the aforesaid diagnosis of plaintiff's illness, and in the performance of the aforesaid tests, evaluations and examinations, whether said performance was by actual participation therein, or ancillary thereto by passive cooperation, occurrence,

approval, or otherwise, defendants, and each of them, negligently failed to possess and exercise that degree of knowledge and skill ordinarly possessed and exercised by other physicians and surgeons, hospitals, nurses, technicians, attendants, and the like, engaged in the same profession in the same or similar circumstances as the said defendants, and each of them.

13. That in consequence of the said diagnosis plaintiff was caused to undergo a high risk, radical and traumatic surgical procedure which served no useful purpose in that no substantial indication of congenital heart disease was thereby disclosed; that the said surgery neither cured nor alleviated the syndrome theretofore complained of by plaintiff; that the said surgery presented no redeeming degree of mitigation or extenuation to justify the physical and emotional trauma and disfiguring scarring of plaintiff's body.

14. That as a direct and proximate result of the negligent breach of medical professional obligation by defendants Charles P. Bailey, M.D., Teruo Hirose, M.D., St. Barnabas Hospital for Chronic Diseases and DOES I through XXXV, inclusive, as aforesaid, plaintiff, Diana M. Schum, has sustained severe, serious and permanent injuries to her person and has and continues to suffer physical pain and mental suffering, all to her damage in the sum of $2,500,000.00.

SECOND COUNT

Plaintiff, Diana M. Schum, for her Second Count against the defendants, and each of them, alleges as follows:

1. Plaintiff, Diana M. Schum, realleges and incorporates by reference, as though fully set forth at length, all of the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of her First Count.

2. That at all times herein mentioned defendant, Charles P. Bailey, M.D., was a physician and surgeon specializing in thoracic and cardiovascular surgery; that the said defendant on or about October 25, 1967, on the premises of the defendant St. Barnabas Hospital for Chronic Diseases, performed a surgical procedure known generally, and classified medically as open heart surgery, on the person of the plaintiff, Diana M. Schum.

3. That at no time prior to the performance of the said surgery by the said defendant did he meet with the plaintiff to personally examine her, interrogate her with respect to her symptoms and prior medical history or discuss with her the probabilities, possibilities or implications of whatever judgments might have been available to her in lieu of open heart surgery, or offer her counsel or advice as to the availability of a choice or choices which might lie between submission to the said surgery and the imminent probability of a mortal termination of her illness, as at that time conveyed to her.

4. Notwithstanding that the defendant, Charles P. Bailey, M.D., as chief surgeon in charge of plaintiff's case, had an opportunity and duty to furnish plaintiff with all of the material information required by her in arriving at an informed decision as to her consent to the performance of the said surgery upon her person, and notwithstanding that the said defendant knew, or should have known, that this duty was solely his, and did not devolve upon the physicians, administrators, employees or servants of his co-defendants, St. Barnabas Hospital for Chronic Diseases, and DOES I to XXXV inclusive, said defendant Charles P. Bailey, M.D., wilfully, wrongfully and negligently permitted the said consent to be given by the plaintiff as part

of a routine administrative transaction between plaintiff and one or more of the said co-defendants, involving such non-medical matters as a discussion involving availability of accommodations, costs, mode of payments for the services to be rendered to plaintiff, and the like.

5. That pursuant to the foregoing, any consent, whether oral or written, to the said surgery by the plaintiff inresponse to a demand for same by any defendant herein, whether the individual making such demand was an independent physician, or a physician acting in respondeat superior to any other defendant or defendants, or by an administrative officer or employee of any other defendant or defendants, or by any other individual in any capacity whatsoever, who is not a party to this action, such authorization on the part of the plaintiff is thereby vitiated and made inoperative by reason of the lack of informed consent.

6.. That plaintiff is informed and believes, and upon such information and belief, alleges that defendant, Charles P. Bailey, M.D., at various times and places between September 20, 1967 and October 20, 1967, asserted to individuals standing in a fiduciary or marital relationship to her that the diagnostic tests theretofore performed upon plaintiff by defendant, St. Barnabas Hospital for Chronic Diseases, indicated to a reasonable certainty that plaintiff suffered from a type of congenital heart disease that presented a grave threat to her well being, and that if such cardiac anomaly was not promptly repaired and corrected through surgical intervention, plaintiff's life expectancy might thenceforth be measured in terms of mere months.

7. That upon the aforesaid assertion being made known to the plaintiff, who believed in an relied upon the truth thereof, said plaintiff became extremely fearful, apprehensive and agitated,

to the extent that she was incapable of calling upon and exercising her free judgment, she being then in fact, in a position where the sole choice lay in her assenting to, or rejecting, the proposition that the prolongation of her life rested in the consent to the said surgery.

8. That as a direct and proximate result of this negligent omission to obtain an effective and informed consent to the said surgery by defendant Charles P. Bailey, M.D., Teruo Hirose, M.D., St. Barnabas Hospital for Chronic Diseases and DOES I through XXXV, inclusive, as aforesaid, plaintiff, Diana M. Schum has sustained severe, serious and permanent injuries to her person and has and continues to suffer physical pain and mental suffering, all to her damage in the sum of $2,500,000.00.

THIRD COUNT

Plaintiff, Diana M. Schum, for her Third Count against defendants, and each of them, alleges as follows:

1. Plaintiff, Diana M. Schum, realleges and incorporates by reference, as fully as though set forth at length, all of the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of her First Count and Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, of the Second Count.

2. That defendant, Charles P. Bailey, M.D. performed a surgical procedure medically classified as an exploratory cardiotomy, on October 25, 1967, on the person of the plaintiff, on the premises of defendant, St. Barnabas Hospital for Chronic Diseases.

3. That the said surgery was performed in the absence of an effective and informed consent by the plaintiff.

4. That in so doing, defendant, Charles P. Bailey, M.D., committed a trespass and an assault and battery upon the person of plaintiff.

5. That defendant, Teruo Hirose, M.D., as director of the cardiovascular laboratory maintained by defendant St. Barnabas Hospital for Chronic Diseases, aided and abetted in the said trespass and assault and battery by his presence at, and assisting in, the said surgery; that prior thereto he supervised the various diagnostic tests done on the plaintiff, approved the findings therein, and concurred in the decision to undertake the said surgery.

6. That DOES I through X, inclusive, and each of them, acting as surgeons, physicians, consultants, and the like, aided and abetted the said trespass and assault and battery by assisting at the said surgery, and/or having full knowledge of the weight and significance of the diagnostic evidence available to them, pro and con, nevertheless concurred in, and approved of, through consultation, or otherwise, the performance of the said surgery.

7. That defendant, St. Barnabas Hospital for Chronic Diseases, aided and abetted the said trespass and assault and battery by wilfully and negligently failing to establish such rules and regulations as may be required to prescribe the professional conduct of its medical and surgical staff, or if so prescribed, then in failing to enforce the said rules and regulations to assure such full and comprehensive pre-operative consultation as may be needed to consider and evaluate each and every parameter of plaintiff's diagnosis and medical history prior to the authorization of such surgery, all to the injury and damage to the plaintiff.

8. That as a direct and proximate result of the said trespass and assault and battery by the defendants Charles P. Bailey, M.D., Teruo Hirose, M.D., St. Barnabas Hospital for Chronic Diseases and DOES I through X, inclusive, as aforesaid, plaintiff Diana M. Schum, has sustained severe, serious and permanent injuries to her person and has and continues to suffer physical pain and mental suffering, all to her damage.

FOURTH COUNT

Plaintiff, Diana M. Schum, for her Fourth Count against defendants, and each of them, alleges as follows:

1. Plaintiff, Diana M. Schum, realleges and incorporates by reference, as fully as though set forth at length herein, all of the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the First Count, Paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the Second Count and Paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the Third Count.

2. That during the first or second week in October until the time the plaintiff, Diana M. Schum, entered the defendant, St. Barnabas Hospital for Chronic Diseases, on or about October 20, 1967 for open heart surgery by defendant, Charles P. Bailey, M.D., the defendants, Teruo Hirose, M.D., Charles P. Bailey, M.D., and DOES I through X represented to the plaintiff, Diana M. Schum that she was suffering from a serious cardiac anomaly which urgently required immediate surgical repair to the extent that failure to so submit to immediate surgical intervention posed a serious threat to her life.

3. That such representation by the defendants, Charles P. Bailey, M.D., Teruo Hirose, M.D., and DOES I through X is now, and was when made, false.

4. That such representation was not actually believed by the defendants, Charles P. Bailey, M.D., Teruo Hirose, M.D., and DOES I through X, on reasonably grounds to be true when made.

5. That the defendants, Charles P. Bailey, M.D., Teruo Hirose, M.D., and DOES I through X, made such representation to the plaintiff, Diana M. Schum, intending the plaintiff should rely upon them and thus submit herself to surgery.

6. That on or about October 20, 1967, in reliance upon and in the belief that the representations as made by the defendants, Charles P. Bailey, M.D., Teruo Hirose, M.D., and DOES I through X, were true, did admit herself to the defendant, St. Barnabas Hospital for Chronic Diseases for the proposed surgery.

7. That in so acting as above described, the plaintiff was ignorant of the falsity of the representation of the defendants, Charles P. Bailey, M.D., Teruo Hirose, M.D., and DOES I through X, and reasonably believed such representation to be true.

WHEREFORE, plaintiff demands judgment against the defendants, Charles P. Bailey, M.D., Teruo Hirose, M.D. and DOES I through X, jointly, severally or in the alternative, for damages in the amount of $2,500,000.00, together with interest thereon to be computed pursuant to the Rules of Court, costs of suit and such further relief as the Court may deem just and equitable.

SHEDD MORAITES & RATHE
Attorneys for Plaintiff

By: /s/William B. Shedd
WILLIAM B. SHEDD

JURY DEMAND

PLEASE TAKE NOTICE that the plaintiff, Diana M. Schum, hereby demands trial by a jury of twelve persons of the within action

SHEDD MORAITES & RATHE
Attorneys for Plaintiff

By: /s/William B. Shedd
WILLIAM B. SHEDD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

DIANA M. SCHUM,

Plaintiff,

Judge Owen
74 CIV. 4354

-against-

CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every number between I and XXXV inclusive.

NOTICE OF MOTION

Defendants.
- -X

S I R :

PLEASE TAKE NOTICE, that upon the annexed Affirmation of STEVEN C. MANDELL, ESQ., a member of the firm of McALOON, FRIEDMAN, MANDELL, MALANG & CARROLL, ESQS., of counsel for the defendant HIROSE, and upon the exhibits annexed hereto, the undersigned will move this Court, located at Foley Square, New York, New York, before Judge Richard Owen, on the 2nd day of February, 1975, at 2:15 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 12(b) of the FRCP, dismissing the plaintiff's complaint on the grounds that none of the causes of action alleged therein state a claim upon which relief can be granted, or in the alternative, pursuant to Rule 56(b) of the FRCP dismissing the plaintiff's complaint and granting the defendant HIROSE summary judgment on the grounds that all of the causes of action alleged in the plaintiff's complaint are barred by the applicable statutes of limitations, and for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, are to be served at least three (3) days prior to the return date of this motion.

Dated: New York, New York
January 27, 1975

Yours, etc.

McALOON, FRIEDMAN, MANDELL, MALANG & CARROLL, ESQS.

By: s/ Steven C Mandell
Of counsel to the Defendant HIROSE
Office and P.O. Address
75 Maiden Lane
New York, New York 10038
Tel. No.: (212) 344-0979

TO:

SHEDD, MORAITES & RATHE, ESQS.
Attorneys for Plaintiff
405 Park Avenue
New York, New York 10022

ANTHONY L. SCHIAVETTI, ESQ.
Attorney for Defendant BAILEY
1633 Broadway
New York, New York 10019

ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES
Defendant Pro Se
Third Avenue, Between 181st and 183rd Streets
Bronx, New York 10457

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

DIANA M. SCHUM,

Plaintiff,

-against-

CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every number between I and XXXV inclusive.

AFFIRMATION

Defendants.
- -X

STEVEN C. MANDELL, ESQ., an attorney admitted to practice before this Court and the Courts of this State, and a member of the firm of McALOON, FRIEDMAN, MANDELL, MALANG & CARROLL, ESQS., of counsel for the Defendant HIROSE herein, states that he is familiar with the facts and circumstances heretofore had herein by virtue of a review of the file maintained in this matter in your affirmant's office.

The within affirmation is submitted in support of the defendant HIROSE'S motion to dismiss the plaintiff's complaint.

The instant action is brought by plaintiff to recover damages for personal injuries sustained as a result of the defendants' alleged medical malpractice, failure to obtain an informed consent, trespass, assault and battery upon the plaintiff's person, and fraud.

The records contained in the file maintained in this Courthouse indicate that the instant action was commenced as to the defendant HIROSE on October 4, 1974, that day being the date on which the complaint in this action was filed with the United

States Marshall's Office (see Rule 3 of the FRCP). The summons and complaint were actually served upon the defendant HIROSE on or about October 15, 1974.

For the purposes of this motion, we concede all of the allegations set forth by the plaintiff in her complaint to be true. (see Exhibit "A")

As to the defendant HIROSE, Count I of the complaint / alleges, in substance, the following:

> That the said defendant was and still is a doctor duly licensed to practice medicine in the State of New York.
>
> That on September 18, 1967, plaintiff engaged this defendant's services and was admitted to St. Barnabas Hospital for Chronic Diseases for diagnostic workup and clinical evaluation of a cardiac problem.
>
> That on September 20, 1967, plaintiff was discharged from the defendant St. Barnabas Hospital for Chronic Diseases having been informed that all tests were negative for organic coronary disease or related cardiovascular problem.
>
> That two weeks later the defendant Bailey informed plaintiff that the original evaluation of the diagnostic tests was erroneous and that the tests actually disclosed a serious cardiac anomaly requiring immediate surgical repair.
>
> That the plaintiff relied upon the aforesaid representations and was readmitted to St. Barnabas Hospital for Chronic Diseases on October 20, 1967 for open heart surgery to be performed by the defendant Bailey.
>
> That the defendants, including Hirose, determined plaintiff was suffering from a congenital heart disease.
>
> That the defendants were negligent in the performance and evaluation of the aforesaid diagnostic tests.

DEFENDANT HIROSE CONTENDS

This plaintiff was discharged from St. Barnabas Hospital for Chronic Diseases on November 19, 1967 (see face sheet - Exhibit "B"; see progress note - Exhibit "C"; see standing order sheet - Exhibit "D"; and see nurses' notes - Exhibit "E").

Assuming arguendo, that the defendant HIROSE had anything at all to do with respect to the treatment rendered to the plaintiff, through and including November 19, 1967, it cannot, nevertheless, be denied by plaintiff that she ever saw or received from the defendant HIROSE any medical treatment following her discharge from St. Barnabas Hospital for Chronic Diseases on November 19, 1967.

That being true, at best, plaintiff has commenced the instant action approximately seven (7) years after having last received any medical treatment by the defendant HIROSE. Thus, this cause of action is time barred in accordance with the three (3) year New York statute of limitations as contained in Section 214(6) of the Civil Practice Laws and Rules (CPLR) in that the claim herein is brought more than four (4) years after the running of the said statute of limitations requiring dismissal of this cause of action (see POINT I in defendant's Memorandum of Law).

As to the defendant HIROSE, Count II of the complaint alleges, in substance, the following:

> That the defendants, including Hirose, negligently omitted to obtain an effective and informed consent from the plaintiff with respect to the surgery performed on October 25, 1967.

DEFENDANT HIROSE CONTENDS

Various courts in the State of New York have held that a cause of action for lack of informed consent, for the purposes of the statute of limitations in New York, states either a claim in medical malpractice or one in assault. If the former, the cause of action is governed by the three (3) year New York statute of limitations (Section 214(6) of the CPLR), and if the latter, by the one (1) year New York statute of limitations (Section 215(3) of the CPLR). In either event, as to the defendant HIROSE, the alleged failure to obtain an informed consent having occurred on or before the surgical procedure which took place on October 25, 1967 and suit having been commenced on October 4, 1974, the instant cause of action is likewise brought untimely, either four (4) years or six (6) years too late and must be dismissed (see POINT II of defendant's Memorandum of Law).

As to the defendant HIROSE, Count III of the complaint alleges, in substance, the following:

> That the surgery performed by the defendant Bailey on October 25, 1967, in the absence of an informed consent, with the assistance of the defendant Hirose, constituted a trespass and an assault and battery.

DEFENDANT HIROSE CONTENDS

This cause of action is, likewise, time barred by the one (1) year New York statute of limitations (Section 215(3) of the CPLR) requiring dismissal of this claim (see POINT II of defendant's Memorandum of Law).

As to the defendant HIROSE, Count IV of the complaint

A-17

alleges, in substance, the following:

> That the defendants Bailey and Hirose falsely represented to the plaintiff that she was suffering from a serious cardiac anomaly which urgently required surgical repair and that in reliance upon said representations plaintiff submitted to the proposed surgery.

DEFENDANT HIROSE CONTENDS

This cause of action fails to state a claim upon which relief can be granted and the Courts of the State of New York have routinely rejected such claims as being nothing more or less than an attempt to circumvent the inevitable dismissal of malpractice claims which are otherwise time barred by the three (3) year New York statute of limitations. The plaintiff's attempt to plead a cause of action in fraud so as to obtain the benefit of the six (6) year New York statute of limitations pursuant to Section 211(9) of the CPLR has been of no avail and in similar circumstances such a claim has been repeatedly dismissed. (see POINT III of the defendant's Memorandum of Law)

WHEREFORE, it is respectfully requested that the defendant HIROSE'S motion to dismiss the plaintiff's complaint on the grounds that each of the causes of action alleged are time barred by the applicable New York statutes of limitations and thus fail to state a cause of action upon which relief can be granted or, in the alternative, for summary judgment on the grounds that, as a matter of law, the causes of action are time barred be, in all respects, granted.

The undersigned affirms that the foregoing statements are true pursuant to penalties of perjury.

Dated: New York, New York
January 27, 1975

STEVEN C. MANDELL, ESQ.

99-25902M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DIANA M. SCHUM,

Plaintiff,

-against-

NOTICE OF MOTION

CHARLES P. BAILEY, M.D. TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every number between I to XXXV inclusive.

Defendants

----------X

S I R :

PLEASE TAKE NOTICE, that upon the annexed affirmation of ANTHONY L. SCHIAVETTI, ESQ., attorney for the defendant CHARLES P. BAILEY, M.D. and upon the exhibits annexed hereto, the undersigned will move this Court, located at Foley Square, New York, New York, before Judge Richard Owen, on the 21st day of February, 1975, at 2:15 o'clock inthe afternoon of that day, or as soon therafter as counsel may be heard, for an order pursuant to Rule 12(b) of the FRCP, dismissing the plaintiff's complaint on the grounds that none of the causes of action alleged therein stated a claim upon which relief can be granted, or in the alternative, pursuant to Rule 56(b) of the FRCP dismissing the plaintiff's complaint and granting the defendant BAILEY summary judgment on the grounds that all of the causes of action alleged in the plaintiff's complaint are barred by the applicable statutes of limitations, and for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, are to be served at least three (3) days prior to the return date of this motion.

DATED: New York, New York
January 31, 1975

Yours, etc.

ANTHONY L. SCHIAVETTI, ESQ.
Attorney for Defendant-BAILEY
Office and P.O. Address
1633 Broadway
New York, New York 10019

BY: _____
A MEMBER OF THE FIRM

TO: SHEDD, MORAITES & RATHE, ESQS.
Attorneys for Plaintiff
405 Park Avenue
New York, New York 10022

ST. BARNABAS HOSPITAL FOR
CHRONIC DISEASES
Defendant Pro Se
Third Avenue, Between 181st
and 183rd Streets
Bronx, New York 10457

McALOON, FRIEDMAN, MANDELL, MALANG &
CARROLL, ESQS.
Of Counsel to the Defendant-HIROSE
Office and P.O. Address
75 Maiden Lane
New York, New York 10038
Tel No.: (212) 344-0979

-25902-M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DIANA M. SCHUM,

Plaintiff

-against-

CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I TO XXXV, including each and every number between I and XXXV inclusive.

Defendants.

----------X

AFFIRMATION

ANTHONY L. SCHIAVETTI, ESQ., an attorney admitted to practice before this Court and the Courts of this State, attorney for the defendant CHARLES P. BAILEY, states that he is familiar with all the facts and circumstances heretofore had herein, the source of his knowledge being the files and records maintained in this office. This affirmation is submitted in support of the motion by the defendant CHARLES P. BAILEY to dismiss the plaintiff's complaint.

This action is brought to recover damages for the personal injuries allegedly sustained by the plaintiff due to the alleged medical malpractice of the defendants. The complaint sets forth four counts, the first being malpractice/negligence, the second being for negligent omission to obtain informed consent, the third being for trespass and assault and battery and the fourth being for fraud. The summons and complaint is attached hereto as exhibit "A".

This action was commenced on October 4, 1974, the date on which the complaint was filed with the Clerk of the Court, this date appearing on the summons, exhibit "A". For the purposes of this motion, it is conceded that the Statute of Limitations ceased to run on October 4, 1974.

AS TO THE FIRST COUNT

The first cause of action sounds in negligence and is therefore governed by CPLR 214(6) which permits actions in negligence to be commenced three years after accrual. The incident complained of occurred on or before October 1967, the time at which the plaintiff underwent surgery. This Statute of Limitations is however extended by the "continuous treatement" doctrine, See Memorandum of Law. This doctrine states that the Statute does not start to run until the last date of treatment, for the same illness, by the doctor who allegedly committed the malpractice.

In the case at bar, that date is October 21, 1970, the last occasion the defendant CHARLES P. BAILEY saw the plaintiff for any reason whatsoever. This fact is attested to in the annexed affidavit of the defendant CHARLES P. BAILEY and is supported by exhibit "B" which is a copy of the portion of DR. BAILEY'S office records referring to this last contact between the plaintiff and this defendant.

In view of the above, this action should have been commenced on or prior to October 21, 1973. Since the action was not commenced until October 4, 1974 it is barred by the Statute of Limitations and therefore must be dismissed.

AS TO THE SECOND COUNT

The second cause of action alleges that the defendants were negligent in failing to obtain the plaintiffs informed consent. There is some conflict, See Memorandum of Law, as to whether the Statute of Limitations for this type of allegation is governed by the three year Statute of Limitations, CPLR 214 (6) or the one year Statute of Limitations,

CPLR 215 (3). However, in the case at bar it does not matter which Statute of Limitations applies as more than three years have passed since the last date of treatment. In view of the above this second cause of action is barred by the Statute of Limitations and must be dismissed.

AS TO THE THIRD COUNT

The third cause of action in the plaintiff's complaint alleges that the defendant failed to obtain the plaintiff's informed consent and thereby committed a trespass and assault and battery upon the plaintiff.

It would appear that the one year Statute of Limitations, CPLR 215 (3) applies to this action, but, once again, even if the Statute of Limitations is found to be three years, CPLR 214, (6), the action is still barred in that it was not asserted within the three years from the last date of treatment.

Accordingly this cause of action is barred by the Statute of Limitations and therefore must be dismissed.

AS TO THE FOURTH COUNT

The fourth count of the plaintiff's complaint apparently alleges that the defendants are guilty of fraud. It seems that the plaintiff hopes to avoid the inevitable dismissal of the complaint based on the Statute of Limitations by invoking CPLR 213 (9), the six year Statute of Limitations for fraud. It seems clear that this action is one for malpractice and that alleged negligence is the true underlying wrong that the plaintiff is attempting to use to obtain a recovery. The mere use of the word "fraud" does not change the true "gist" of the action and therefore this cause of action does not state a claim upon which relief can be granted and it must

be dismissed. In addition, if this cause of action is found to be sounding in negligence, then it too is barred by the Statute of Limitations, CPLR 214 (6).

WHEREFORE, it is respectfully requested that the defendant BAILEY'S motion to dismiss the plaintiff's complaint on the grounds that each of the causes of action alleged are time barred by the New York CPLR and fail to state a cause of action upon which relief can be granted or, in the alternative, for summary judgment on the grounds that as a matter of law the causes of action are timely barred and/or they fail to state a cause of action upon which relief can be granted, be in all respects, granted. The undersigned affirms that the foregoing statements are true pursuant to penalties of perjury.

DATED: NEW YORK, NEW YORK, January 31, 1975

ANTHONY L. SCHIAVETTI

99-25902M UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----------X

DIANA M. SCHUM

Plaintiff

A F F I D A V I T

-against-

CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every number between I to XXXV inclusive.

Defendants

----------X

STATE OF NEW YORK)
COUNTY OF NEW YORK)

CHARLES P. BAILLY, M.D. being duly sworn, deposes and says:

1. That your deponent is a physician licensed to practice medicine in the State of New York, maintaining offices at 14 East 60th Street, New York, New York 10022.

2. That your deponent is one of the named defendants in the above captioned lawsuit, and makes this affidavit in support of the motion to dismiss the plaintiff's complaint on the grounds that the action is not timely brought and therefore is barred by the Statute of Limitations.

3. That on October 25, 1967 your deponent performed surgery on this plaintiff at St. Barnabas Hospital and thereafter saw her on various occasions for the purpose of follow up care. My last contact of any type whatsoever with this plaintiff was on October 21, 1970. Attached to these papers is a copy of a portion of my office records dated October 21, 1970, Exhibit B , whowing my findings on this last contact date.

4. That I have been advised by my attorney that since more than three (3) years have passed since my last contact with this plaintiff the Statute of Limitations is now a complete bar to the plaintiff's action and I therefore respectfully request that the Court grant this motion and dismiss the plaintiff's complaint.

Sworn to before me this 31st
day of January, 1975

Charles P. Bailey, MD
CHARLES P. BAILEY, M.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

DIANA M. SCHUM,

74 Civ. 4354

Plaintiff,

-against-

CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every number between I and XXXV, inclusive,

Defendants.

- -X

STATE OF NEW JERSEY)
COUNTY OF BERGEN)

DIANA M. GOLDSMITH, being duly sworn according to law, upon her oath deposes and says:

1. I am the plaintiff in the within action. My surname is no longer Schum by reason of a remarriage. I know all matters contained herein to be true. This Affidavit is submitted to the Court in opposition to the motions for summary judgment of Dr. Bailey and Dr. Hirose.

2. In 1967 I suffered from certain physical ailments, which included pains in my chest and left arm, hyperventilation and a general weakened condition. On one occasion, in July, 1967, the pain became so intense that I lost consciousness and was taken

by ambulance to Hackensack Hospital, Hackensack, New Jersey. After consulting with my then-physician, Dr. Kenneth Delafrange (now deceased), I was taken from Hackensack Hospital to Pascack Valley Hospital, Westwood, New Jersey, for diagnostic tests so as to ascertain the source [illegible].

3. I remained in Pascack Valley Hospital for approximately 20 days. During this time extensive testing was performed upon me. The testing, which included several electrocardiograms, failed to show any physical source for my pain.

4. Approximately 10 days after being discharged from Pascack Valley Hospital, I suffered another incident of severe pain, causing me to faint. I was then readmitted to Pascack Valley Hospital for the purpose of further testing. I remained at Pascack Valley Hospital for another period of approximately 20 days, during which time further testing was performed upon me. Once again, the diagnostic tests failed to disclose any source for my pain and hyperventilation.

5. During my second hospitalization at Pascack Valley Hospital, Dr. Delafrange recommended that I consult with a friend of his, Dr. Charles P. Bailey, whom Dr. Delafrange represented as a leading cardiologist. Upon agreeing to have Dr. Bailey examine me, I was taken by ambulance from Pascack Valley Hospital to St. Barnabas Hospital, Bronx, New York.

6. At. St. Barnabas Hospital, I was subjected to a medical procedure which consisted of an incision being made in my right arm. This incision exposed an artery leading to my heart. I was then attached to an electrocardiogram machine and other types of monitoring equipment. During this procedure, several doses of a hot liquid were injected into my arm, and I began hyperventilating. As I was still conscious, I heard several of the physicians then present comment that such reaction was normal and to be expected.

7. I was discharged from St. Barnabas Hospital on September 20, 1967. Prior to my discharge, I received assurances from several of the defendants to the effect that the tests performed upon me disclosed no problem with my heart.

8. Approximately three weeks after my discharge from St. Barnabas Hospital, I received a telephone call from Dr. Delafrange who advised me to contact Dr. Bailey immediately, for, as he stated, I needed immediate open heart surgery. My husband then contacted Dr. Bailey and was advised that unless surgery was immediately performed upon me, my life span could be measured in a matter of weeks.

9. In October, 1967, I was readmitted to St. Barnabas Hospital for the purpose of having heart surgery performed. The pre-operative procedure lasted three days. During one of the

physical examinations performed during this pre-operative period, the examining physician, who was one of Dr. Bailey's associates, commented to me that it was strange that he "could not hear anything". I thought nothing of the incident at the time. Not only was I fearing for my life, but I did not know at that time that the particular cardiac anamoly which I allegedly possessed is evidenced by a distinctive murmur.

10. During the pre-operative procedure I also lapsed into a near-coma due to the administration of the drug mercurhydrin. The defendants had failed to ascertain my allergy to this drug.

11. The heart surgery was performed on October 25, 1967. During the operation, four metal plates were inserted in my chest cavity to aid in the healing of the breast bone. These plates have never been removed.

12. After the surgery in question, I was placed in an intensive care section for five days. I remained in the hospital for several weeks and was finally discharged the day prior to Thanksgiving Day, 1967. During my period of recouperation at St. Barnabas Hospital, on at least one occasion, I started to hyperventilate and required oxygen. Such hyperventilation was one of the maladies that the surgery in question was to have cured.

13. After my discharge from St. Barnabas Hospital, I saw Dr. Bailey on several occasions at an office in Manhattan.

During these examinations, Dr. Bailey stated that the surgery had been perfectly performed. He further assured me that everything was progressing well.

14. In 1973 I was in the process of receiving a divorce from my then-husband. During this period I was under a severe emotional strain. While under this strain, all those symptoms which were to have been cured by the surgery in question re-appeared, namely, hyperventilation, chest pains and a general weakened condition. In fact, my initial reaction to these pains was the fear that I would be forced, once again, to undergo heart surgery.

15. It was only at this time, in 1973, that I was advised by competent medical authority that the surgery in question had been needlessly performed.

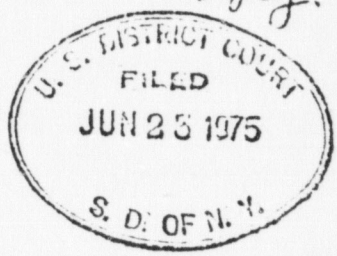
16. I submit this Affidavit in the hope of demonstrating to this Court that at no time did I delay in bringing this matter to judicial attention, nor did I have reason to believe, prior to 1973, that the surgery in question was other than proper.

DIANA M. GOLDSMITH

Sworn and subscribed to
before me this 25th day
of February, 1975.

JULIANNE GOETTINGER
A Notary Public of New Jersey
My Commission Expires Nov. 27, 1980

Copy.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIANA M. SCHUM, Plaintiff, -against- CHARLES P. BAILEY , M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every number between I and XXXV, inclusive, Defendants.	74 Civ. 4354 MEMORANDUM AND ORDER #42693

OWEN, District Judge.

Defendants Charles P. Bailey, M.D. and Teruo Hirose, M.D., move for an order pursuant to Rule 12(b) Fed. R. Civ. P., dismissing the plaintiff's complaint for failure to state a claim upon which relief can be granted. In the alternative, both defendants move pursuant to Rule 56(b) Fed. R. Civ. P. for summary judgment on the grounds that all causes of action alleged in the plaintiff's complaint are barred by the applicable statute of limitations. For the reasons set forth, the motions to dismiss are granted.

This is a medical malpractice action brought by plaintiff, Diana Schum, to recover damages for personal

injuries allegedly sustained by virtue of her having undergone "unnecessary" open heart surgery performed by Drs. Bailey and Hirose. It appears that Dr. Bailey performed the surgery in question on October 25, 1967 and treated plaintiff up to and including October 21, 1970 the date upon which he last saw her as a patient. It is undisputed that Dr. Hirose last saw the plaintiff on November 19, 1967, the date of her discharge from the hospital. Prior to that date he apparently assisted in plaintiff's diagnostic tests, the results of which led to her eventual surgery. Plaintiff's complaint alleges four "counts" upon which recovery is sought. Plaintiff alleges first that the "unnecessary" surgery performed upon her constituted negligence and malpractice; second that both defendants negligently failed to obtain her informed consent for the surgery; third she alleges trespass and assault and battery arising out of the surgery; and fourth she claims fraud.

Both doctors contend that all allegations are barred by applicable statutes of limitations. I agree.

The first cause of action alleging malpractice is governed by C.P.L.R. 214(6) providing a three-statute of limitations. The

incident complained of occurred in October of 1967, the time at which plaintiff underwent surgery. Plaintiff Schum contends that this statute of limitations is extended by the "continuous treatment" doctrine which tolls the running of the statute until the last day of treatment for the same illness by the doctor who allegedly committed the malpractice.

The last date on which Dr. Bailey treated plaintiff for her heart problem was October 21, 1970. Thus, even as extended by the "continuous treatment" doctrine, the action in respect of "Count 1" if not commenced prior to October 21, 1973, is time-barred. The action was in fact not commenced until October 24, 1974.

The second cause of action alleges that the defendants were negligent in failing to obtain plaintiff's informed consent to the surgery. There is a conflict in the law as to whether the three-year statute of limitations for such an allegation is governed by C.P.L.R. 214(6) or C.P.L.R. 215(3).* Whichever statute governs however, it makes little difference since the three years have passed in any event. Thus plaintiff's second cause of action is likewise barred by the statute of limitations.

*Contrast DiRosse v. Wein, 25 App. Div. 2d 510, 261 N.Y.S.2d 623 (2d Dep't 1965) with Fogal v. The Genesee Hospital, 41 App. Div. 2d 468, 344 N.Y.S.2d 552 (4th Dep't 1973).

In the third cause of action plaintiff alleges that the defendant failed to obtain her informed consent and thereby committed a trespass and assault and battery. Again whichever statute of limitations applies, either one-year under C.P.L.R. 215(3) or three years under C.P.L.R. 214(6), the action is still time-barred especially in view of the fact that the "continuous treatment" doctrine would not here be applicable.

The fourth claim of the plaintiff's complaint alleges that the defendants perpetrated a fraud when they induced her to have what she contends was "unnecessary" open heart surgery. Such an allegation hardly seems appropriate for the type of injury allegedly sustained, and I view the fraud claim here, with its six year statute of limitations, as an attempt to overcome the obvious limitation problem inherent in the entire case. The New York Courts themselves have consistently held in malpractice actions that it is the three year statute which applies and not the six year fraud statute. Gautieri v. New Rochelle Hosp. Assoc., 4 A.D.2d 874,166 N.Y.S. 2d 394 (2d Dep't., 1957), aff'd 5 N.Y.2d 952 (1959) and Golia v. Health Ins. Plan of Greater New York, 6 A.D.2d 884, 177 N.Y.S.2d 550 (2d Dep't., 1958).

This is an appropriate case to be resolved by summary judgment. There is no dispute between the parties as to the termination date of plaintiff's treatment by the respective defendant doctors. See Sheets v. Burman, 322

F.2d 277 (5th Cir. 1963).

Plaintiff however seeks to avoid the clear time-bar by urging the applicability to her facts of two recent New York State decisions which allowed exceptions to the strict application of the three-year statute of limitations. In Flanagan v. Mt. Eden General Hospital, 24 N.Y.2d 427,301 N.Y.2d 23 (1969) a surgical clamp was negligently allowed to remain in the plaintiff's body after a gall bladder operation. Plaintiff did not discover, nor did he have reason to discover, the existence of the clamp until more than three years after the operation. The Court of Appeals held that in "foreign object" cases, the statute of limitations would not run until the plaintiff discovered, or reasonably should have discovered, the foreign object within his body. Clearly the allegations in this action do not fall within the "foreign objects" category and thus the rule in Flanagan has no application to these facts. In Dobbins v. Clifford, 39 A.D.2d 1,330 N.Y.S.2d 743 (4th Dep't 1972) plaintiff's pancreas was damaged during an operation for the removal of his spleen. The Appellate Division permitted the plaintiff to bring suit more than three years after the operation even though there was no foreign object left in his body. The Court in Dobbins, while continuing to adhere to the Flanagan rule, held:

"...that by following the rationale in Flanagan, the rule can be extended to cover the facts in the instant case since the same fundamental factors are present in each. They are: an act of malpractice committed internally so that discovery is difficult; real evidence of the malpractice in the form of the hospital record is available at the time of suit; professional diagnostic judgment is not involved, and there is no danger of false claims." 330 N.Y.S.2d at 746-747.

It is obvious from both Flanagan and Dobbins that the New York Courts are unwilling to extend time for suit even in cases where the malpractice is difficult of discovery unless there is not only substantial proof in support of the genuiness of the claim that was in existence at the time of the alleged malpractice,* but also the action must not involve a hindsight attack on a professional diagnosis by a disappointed patient.

Having carefully reviewed plaintiff's complaint herein, as well as all the affidavits and arguments submitted on this motion, it is clear that plaintiff does not come within the exception permitted by Dobbins. In particular, it is clear from paragraphs 9, 12 and 13 of the complaint, that the thrust of plaintiff's cause of action is the professional diagnostic judgment of Drs. Bailey and Hirose and their decision that the plaintiff required surgery for what they considered to be a serious cardiac anomaly. For example, paragraph 9 of the complaint states "that...plaintiff received a communication from...Bailey...informing her that their original evaluation of the initial findings based on diagnostic

*Ie., the very clamp negligently left in the body or a contemporaneous hospital record revealing negligence.

tests and examinations she had undergone were erroneous, inaccurate and clinically misleading in that said tests had allegedly disclosed the existence of an allegedly serious cardiac anomaly which urgently required immediate surgical repair..." Paragraph 12 states: "That in the aforesaid diagnosis of plaintiff's illness...defendants, and each of them, negligently failed to possess and exercise that degree of knowledge and skill ordinarily possessed and exercised by other physicians and surgeons..." And finally, paragraph 13 states: "That in consequence of the said diagnosis plaintiff was caused to undergo a high risk...surgical procedure...".

More appropriate is Schiffman v. Hospital for Joint Diseases, 36 A.D.2d 31,319 N.Y.S.2d 674 (2d Dep't 1971), leave to appeal denied, 29 N.Y.2d 483, 329 N.Y.S.2d 1028 (1971). There, plaintiff alleged that his biopsy slides were negligently read in 1959 as indicating malignancy. This resulted in the plaintiff having to undergo unnecessary radiation therapy which in turn resulted in his injury. Plaintiff argued that he did not discover that his biopsy slides had been misread until 1967 and, therefore, under the rule of Flanagan, the statute of limitations was tolled until that date and his action filed in 1969 was timely. In dealing with this question the Court in Schiffman held (p.676):

In the appeal before us, the plaintiff's action does not concern the foreign object, but rather a misreading of the biopsy slides to arrive at a mistaken diagnosis of malignancy. The claim of negligence relates to a misdiagnosis of ailment, an area of the physician-patient relationship not touched by the Flanagan holding. We do not think we should further contract the general rule applicable to diagnostic negligence by marking the beginning of the time permitted for the commencement of an action for malpractice by the date of the patient's discovery of the physician's negligence."

In view of all the foregoing, the motions of defendants' Bailey and Hirose to dismiss the complaint as barred by the statute of limitations are granted.

It is so ordered.

United States District Judge

June 11, 1975.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S.C.A. NO. 75-7414

DIANA M. SCHUM, Plaintiff-Appellant, -v- CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every number between I and XXXV, inclusive, Defendants-Appellees.	U.S. DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK CASE NO. 74 Civ. 4354 JUDGE OWEN AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

Julianne Huettinger, being sworn says:

1. I am not a party to the action, am over 18 years of age and reside at 309-C Reichelt Road, New Milford, New Jersey.

2. On September 30, 1975, I served two true copies of the annexed Appellant's Brief and Appendix upon Anthony L. Schiavetti, Esquire, attorney for defendant, CHARLES P. BAILEY, M.D.; McAloon, Friedman, Mandell, Malang & Carroll, Esquires, attorneys for defendant, TERUO HIROSE, M.D.; and Smith, Griffin & Scully, Esquires, attorneys for defendants, ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, in this action, by mailing the same in the U.S. Post Office within the State of New Jersey, in a sealed envelope with postage prepaid thereon,

addressed to said attorneys at said addressees' last known addresses, respectively, at 1633 Broadway, New York, New York 10019; 75 Maiden Lane, New York, New York 10038; and 100 William Street, New York, New York 10038, by certified mail, return receipt requested.

Julianne Huettinger

Julianne Huettinger

Sworn to before me this
30th day of September,
1975.

Robert Lichtenstein

ROBERT LICHTENSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4526983
Qualified in New York County
Commission Expires March 30, 1976

Index No. *Year 19*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S.C.A. NO 75-7414

DIANA M. SCHUM,

Plaintiff-Appellant,

-v-

CHARLES P. BAILEY, M.D., TERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I to XXXV, including each and every number between I and XXXV, inclusive,

Defendants Appellees.

U.S.DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

CASE NO. 74 Civ. 435

JUDGE OWEN

AFFIDAVIT OF SERVICE

SHEDD, MORAITES & RATHE

Attorneys for Plaintiff-Appellant

~~XXXX XXXX~~
410 ~~XX~~ PARK AVENUE
NEW YORK, NEW YORK 10022
(212) 755-7773

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* *19* *, at* *M.*

Check Applicable Box

Dated:

SHEDD, MORAITES & RATHE

Attorneys for

~~XXXX XXXX~~
410 ~~XX~~ PARK AVENUE
NEW YORK, NEW YORK 10022

To: